a decree of divorce. *Thornley* v. *Thornley*, [1893] 2 Ch. 229. But it is destroyed, if the husband knew that the marriage, owing to consanguinity, was illegal. *Soar* v. *Foster*, 4 Kay & J. 152. The present case of a voidable marriage stands midway between a divorce and an illegal marriage. Since the question at issue is simply the intent with which the husband purchased the property in his wife's name and since the presumption is merely one of fact respecting the intention, the principal case correctly decides that a subsequent annulment of the marriage does not affect the presumption.

BOOK REVIEWS.

A CODE OF THE LAW OF ACTIONABLE DEFAMATION, with a Continuous Commentary and Appendices. By George Spencer Bower, K. C. London: Sweet and Maxwell, Limited. 1908. pp. l, 608.

In view of the excellence of Dr. Odgers' Treatise on Libel and Slander, the first impression of many lawyers will be that there is, at the present time, no place left to be filled by another English work on Defamation. But an examination of Mr. Bower's new book shows it to be a useful companion to the work of Dr. Odgers. The present publication is arranged on an entirely different system from the ordinary legal text-book; affording space for a more extended discussion of fundamental principles as well as of legal nomenclature.

The Code Proper occupies a comparatively small part of Mr. Bower's book.

The office of the first part of the volume is to state the law as now held in England. This is done by putting at the top of the page the Articles of the Code; and inserting beneath notes (or as the author calls it — a Continuous Commentary) giving, and sometimes criticizing, the principal authorities.

The second part, which occupies nearly half the volume, is made up of Appendices; *i. e.*, a series of essays discussing with a free hand the existing law; suggesting some changes in substance and more in legal terminology. Many of these discussions and suggestions are of great value.

Infinite labor has been expended by the author in framing the Articles of his Code. So far as we can judge, no important point is omitted; and there is seldom any ground of objection to the substance of the statements.

As to the arrangement, style, and clearness of the Code, few persons are competent critics. No one, who has not himself attempted a similar task, can fully appreciate the difficulties. Legal instructors, who have tried to formulate the law for the benefit of their students, know that the results are likely to be only approximately correct. With diffidence, we suggest that, if Mr. Bower has erred, it is on the side of fulness of statement. There are some long and involved sentences, the meaning of which is not immediately apparent; and his favorite phrase, "if, but not unless," is sometimes interpolated in a way likely to confuse the reader. If the author, following the example of the framers of the Indian Codes, had inserted illustrative examples after each Article, the difficulties in the way of framing exact illustrations might sometimes have led to a revising and recasting of the language of the Articles themselves.

As to the style and clearness of the essays (or Appendices) as well as the notes to the Code, every one must entertain a favorable opinion. The author, who took high honors at Oxford, is a scholar as well as a lawyer. The Appendices, besides containing excellent discussions of legal questions, are, in some cases, fairly bubbling over with apposite quotations and illustrations from the classics and from English literature. See pp. 380–383, 387, 393–395, 397, 399, 417–422.

In some instances "new terminology" is introduced into the Code; and in the Appendices the author attempts to justify, in each of these cases, "the substitution of a novel term for the one in current use." P. 487. He says: "I have not adopted a single new expression for the mere sake of innovation. . . . In every case the motive for rejecting the current phrase is its tendency to confusion of thought." Preface, viii. "The truth is that terminology reacts on thought." P. 487.

Of these changes in legal nomenclature, all of which deserve careful consideration, the one which strikes us as the most useful is the substitution of the phrase "Defeasible Immunity" for "Qualified (or Conditional) Privilege."

This, however, is only a part of a larger scheme of classification and terminology.

The author uses the general term "immunity" to cover "two genera," "each genus having two species." Under "Absolute Immunity" he puts "Defense of Truth," and what is commonly termed "Absolute Privilege." Under "Defeasible Immunity" he includes "Fair Comment," and the cases which are ordinarily classified under "Qualified (or Conditional) Privilege."

He thinks that "Justification" is not an appropriate term to describe the defense of truth; "for the defendant there escapes, not on his own merits, but on the demerits of the plaintiff." P. 359. "Justification" should not be "treated as something *sui generis*," but should instead be "given its proper place as a form of absolute immunity." P. 363.

He discards "privilege" as an inaccurate and misleading term in this connection. His reasons in brief are as follows:

In the law of defamation the meaning of the term "privilege," as recently used, is "that a person stands in such relation to the facts of the case that he is *justified* in saying or writing what would be slanderous or libellous in any one else, or in himself but for his standing in such relation. In other words, *any member of the public*, given the existence of the facts and his 'relation' thereto, is *entitled* to speak and write freely that which, in the absence of those facts and that relation, *no member of the public* would be allowed to speak or write. . . ." P. 342. This is entirely inconsistent with the idea connoted by the word privilege "in other provinces of law than defamation," or even in ordinary parlance. The usual meaning of privilege "is a favor conferred by a special law, over and above the ordinary law, upon a specific individual, or a member of a particular family, profession, class, or a holder of a particular office, simply in virtue of his being that individual, or belonging to that family, profession, or class, or holding that office, and for no other reason. This special and peculiar right the privileged person or class holds at all times, and no one other than the person, or outside the class in question, has any such right at any time. Whereas, in the other kind of case" (so called "privilege" in the case of defamation) "the right is utterly independent of personality, and is not a right in excess of the ordinary law. It belongs to each and every subject of the King, whenever the requisite conditions come into being. In the one case the right exists in virtue of the person, irrespective of the occasion; in the other, it exists in virtue of the occasion, irrespective of the person." P. 343. That which is called "privilege" in the law of defamation "is (1) not in excess of the law of the land, but part of it, and (2) a liberty or freedom which is the right of no one until the necessary conditions exist, and of every one when they do." P. 345.

Whichever expression is used, whether "Privilege" or "Immunity," the prefix "Defeasible" seems preferable to either "Qualified" or "Conditional," especially as being less likely to engender erroneous notions as to the burden of proof. As Mr. Bower points out, "Qualified" imports the notion of circumscription or limitation as to the creation or existence of a *primâ facie* immunity; and so "Conditional" suggests the idea of a condition precedent to the creation of a *primâ facie* immunity. It is true, no doubt, that certain facts must be shown to exist and that the plaintiff must stand in a certain relation to such facts, in order

to create a *primâ facie* immunity. But when these things are once made to appear, then a *primâ facie* immunity exists; subject to be defeated only by the introduction of evidence by the plaintiff to prove new and distinct facts; *e. g.*, want of honest belief, or wrong motive, on the part of defendant. The step to be taken to overthrow the *primâ facie* immunity "is a destructive one by the plaintiff, and not a supplementary constructive one by the defendant." "That which destroys the defeasible immunity, or may destroy it, — that, in fact, which distinguishes it from the absolute kind of immunity, — is a condition subsequent." Pp. 359, 360.

These incorrect phrases "qualified" and "conditional" may be, to some extent, responsible for the continuance of "a wholly unnecessary practice in pleading; viz., "the practice of inserting in a plea of defeasible immunity ('qualified privilege') an allegation that the defamatory matter was published in good faith, without malice, and in the honest belief that it was true, not one of which facts is there any burden on the defendant, either to allege or to prove, as has been solemnly decided over and over again." P. 490.

Although the expression "fair comment" is retained in the Code, the author believes that the epithet "fair" is needless, if not positively harmful. "'Fair comment" in his view, "means nothing more than 'comment,' *scilicet*, that which is really and exclusively comment — that which is not *ex facie* something else, or does not convict itself, on production, of adulteration." P. 119 note (*t*). In reality, "it comprises a series of negatives," though some of those negatives may be "expressed in a positive form." "'Fair comment,' in fact, is like the Irishman's notion of a net, — 'a lot of holes tied together with string.' Criticism, it is now well settled, in order to entitle itself to any immunity, must (1) *not* be based on facts falsely stated, (2) *not* introduce new facts in the course, and under the guise, of comment, (3) *not* impute personal motives of an evil sort, and (4) *not* express an opinion which is not the critic's real opinion; further, even if, on the face of it, it does not purport to contain any of these elements, its *primâ facie* immunity may be taken away by proof of malice, for, in that case, the plaintiff has a right to say: 'What care I how fair [it] be, If [it] be not fair to me?' Now what does the above come to? Simply to this, that the alleged comment must be wholly and solely comment *ex facie*, 'unmixed with baser matter,' and (if, but not unless, this question is raised by the plaintiff) must have been unprompted by malice. In so far as facts are stated as the basis of the criticism, or allegations of fact are introduced in the course of it, or personal imputations are made not arising out of it, the pretended criticism is not criticism at all. It is not a question of its title to the epithet 'fair,' or to any other epithet: it does not answer to the description of 'comment,' and is defamation pure and simple." P. 388. The mere fact that, "from a literary, artistic, or intellectual point of view," it is unsound or irrational, "does not prevent the comment being 'fair,' if *morally* fair." Pp. 119, 120, 168 note (*k*).

Mr. Bower devotes some space to the consideration of "Certain unnecessary or illogical practices in pleading." Appendix xxi, Section 3. He begins by saying "Nobody at the present day is much concerned for accuracy in pleading, and so far as mere errors in form are corrected by liberality in amendment, this is as it should be: but none the less, as in the case of terminology, words react on thoughts, and illogical and incorrect practices in pleading tend, first, to encourage, and then to perpetuate, false doctrines as to the substantive principles of the law, particularly such vital questions as, for instance, the burden of proof." One of his instances of wholly unnecessary practices in pleading is, "the practice of averring both falsity and malice in the statement of claim, neither of them being part of the cause of action." P. 490. See also Appendix ii: "Malice and Falsity not connoted by Defamation." Pp. 271–276. J. S.